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TEXTS CITED.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1920

No. 638

QUONG HAM WAH COMPANY,
Plaintiff in Error,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, and A. J. PILLSBURY, WILL J. FRENCH and MEYER LISSNER, as members of and constituting said Commission, OWE MING, and ALASKA PACKERS ASSOCIATION (a corporation),
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

Alaska Packers Association, one of the defendants in error, is a California corporation which owns and operates salmon canneries in the Terri-

tory of Alaska and the State of Washington. In the spring of each year it hires large numbers of employees in California to work in these canneries. The contracts of employment are generally made between a contractor and the employee; and in the present case Quong Ham Wah Company was the contractor and Owe Ming the employee. These contracts are signed in California and the employees sail from the port of San Francisco to their destination. There they remain working at the canneries for about six months and return in the late fall to San Francisco, where they are paid off and the relationship terminated. What is known as the inside work of the canneries is done, for the most part, by Orientals, Mexicans and Filipinos, many of whom are not domiciled in California, but who come to San Francisco for the purpose of signing their contracts of employment and embarking upon vessels sailing to the canneries.

Defendant in error, Owe Ming, a resident of California, was hired by the Quong Ham Wah Company in 1918 to work in a cannery of the said Association at Cook's Inlet, Alaska, as a machine tender. While engaged in that employment, and on July 30, 1918, he was injured; this injury, as the Industrial Accident Commission found, was the result of negligence on the part of the employee and was not caused by any negligence on the part of the employer or the Association (fols. 15-16). Upon his return to San Francisco, Owe Ming petitioned the said Industrial Accident Com-

mission for an order granting him compensation, and on March 10, 1919, the commission made an award decreeing that the Quong Ham Wah Company and the Alaska Packers' Association were liable to Owe Ming in the sum of $464.85. The findings are brief (fols. 13-17).

The Quong Ham Wah Company thereupon filed a petition with the Supreme Court of the State of California, asking that the said award be annulled upon the ground that the said commission was without jurisdiction to award compensation for injuries or death occurring outside the territorial limits of the State, except for the provisions of Section 58 of the Compensation Act of 1917, and that said Section 58 was void because it violated Article IV, Section 2, of the Constitution of the United States, in that it granted a privilege to citizens of the State of California which it denied to citizens of other States of the Union, and further, because said section violated Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it denied to persons who are not residents of the State of California the equal protection of the laws with persons who are residents of said State; and further, that said Section 58 was violative of Article IV, Section 1, of the Constitution of the United States, in that it failed to give full faith and credit to the public acts, records and judicial proceedings of the other States in the Union, in this, that although Section 58 provides that residents in California injured in an-

other state of the Union may recover compensation for such injuries, nevertheless it is expressly provided in said Act that the right to compensation or death benefits existing under the terms of the Act shall be in lieu of any other liability whatsoever.

In common with many other of the States of the Union, the legislature of the State of California on May 26, 1913, enacted a Workmen's Compensation, Insurance and Safety Act, which became effective January 1, 1914 (Cal. Stats. 1913, p. 279).

In this original Act no specific provision was made for an accident which occurred without the State of California to an employee who was hired in California. In the case of *North Alaska Salmon Company v. Pillsbury*, 174 Cal. 1, the Supreme Court of California held that compensation for injuries received by an employee beyond the limits of the State was not under the jurisdiction of the commission and that the Act had no extraterritorial effect.

On June 3, 1915, the aforesaid statute was amended in many particulars (Stats. 1915, p. 1079). Section 75a of the amended Act provided (p. 1101):

> "The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state

and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act."

In 1917 the legislature re-enacted the entire measure (Stats. 1917, p. 831), and carried forward Section 75a of the Act of 1915 verbatim to Section 58 of the new Act, so that at the time of the injury complained of in the instant case the section read in the precise form shown above.

The construction of this section came before the Supreme Court of California in the case of *Estabrook v. Industrial Accident Commission*, 177 Cal. 767, in which case it was held that the petitioner could not make the contention that the section of the Act in question was unconstitutional, because he was himself a resident of California and therefore not a member of the class discriminated against. No writ of error to this court was acted upon in this Estabrook case.

The Supreme Court of California have considered the instant case twice. In its first opinion rendered on December 26, 1919, (fols. 26-38), it was decided that the principle as established in the Estabrook case be overruled; that there were certain considerations which enabled a petitioner to raise his constitutional objections to the validity of the statute in question, although such petitioner was not himself a member of the class discriminated against; in other words, Quong Ham Wah Company, although a resident of the State

of California, could raise the point that the aforesaid Section 58 of the Act of 1917 was violative of the Constitution of the United States. Accordingly, the award in question was annulled; it being conceded that the statute manifestly attempted to create an unlawful discrimination between a resident and a nonresident of the State.

From this last judgment a rehearing was granted, and the final judgment of the court below was rendered on October 5, 1920. In this opinion for the first time there was thrown into the case the argument that, although there was by this statute granted a special privilege to a citizen of California, nevertheless by virtue of the provisions of the Federal Constitution that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States" whatever privilege or immunity was granted to a citizen of the State was, by such constitutional provision, extended *ipso facto* to every noncitizen of the State.

In its final opinon rendered on October 5, 1920, and reported in 192 Pacific Reporter, page 1021 (fols. 48-77), the Supreme Court of the State considered carefully the various questions involved, and decided (1) that petitioner, although he was a resident of California, could attack the validity of the aforesaid Section 58 of the Workmen's Compensation Act; (2) that the jurisdiction of the Act had application only because the contract

was made in the State, but there was no inherent reason or basis of discrimination in favor of a resident as against a nonresident of the State; (3) that if the Act did in fact confine the jurisdiction of the commission to the settlement of a controversy arising out of an injury suffered without the State by an injured employee who was a resident of the state, then that the same violated Section 2 of Article IV of the Constitution of the United States, being a discrimination against a nonresident of the state; (4) that although the discrimination complained of would, in fact, necessitate the striking down of the section in question as being discriminatory against a nonresident of the State, nevertheless, in the absence of express language negativing its effect as against such nonresident, the said provisions of the Federal Constitution operated to extend *ex proprio vigore* whatever privilege was thereby granted to all citizens of the several States; (5) that therefore, although the California Act says in express terms that the commission shall have jurisdiction to award a claim for damages arising out of an injury suffered by an injured employee who is a resident of the State, nevertheless this right also accrues to one who is not a resident of the State, by virtue of the Federal Constitution, and whatever privileges and immunities are by this Act extended to a resident of California are also conferred upon a nonresident or noncitizen of California.

To uphold ths last contention the court relied wholly upon a prior decision of the Supreme Court of California (*Estate of Johnson*, 139 Cal. 532).

I.

Argument.

THE JUDGMENT OF THE COURT BELOW THAT PETITIONER, ALTHOUGH A RESIDENT OF CALIFORNIA, COULD NEVERTHELESS ATTACK THE VALIDITY OF THE STATUTE, IS CLEARLY CORRECT.

As noted above, the State Supreme Court in both opinions recognized the distinction between the instant case and those cases which have held that one who is not a member of the class discriminated against is not in a position to attack the law. We can add little to the convincing argument on this point contained in these opinions. In brief, it is there said that the principle enunciated in the Estabrook case does not apply because:

(1) There is a well-defined exception to the rule that no one not a member of the class alleged to be unlawfully discriminated against may raise the constitutional question. A nonresident of California could not raise the question of the constitutionality of the statute because he would have no standing before the commission, and if he applied to a court for relief and succeeded he would by such result have deprived himself of any relief. because the only judgment which the court could

render in such case would be that the section is unconstitutional and void in toto and no relief could be based thereon either to a resident or non-resident.

(2) The case falls directly within the ruling of this court in *Buchanan v. Warley*, 245 U. S. 60. It is not true that the interests of the petitioner, Quong Ham Wah, are not directly affected by the law in question. By the award he has been ordered to pay Owe Ming the sum of $464.85. If the statute is invalid he would owe Owe Ming nothing. Thus, to paraphrase the language of the court in *Buchanan v. Warley*, the obligation of the plaintiff in error to pay a debt was directly involved and, indeed, *created* by the statute alleged to be violative of constitutional rights. "In this case the property rights of the plaintiff in error are directly and necessarily involved".

(3) Any person may raise the question of unconstitutional class discrimination as showing lack of jurisdiction. In the two cases of *Heim v. McCall*, 239 U. S. 175, and *Crane v. People of the State of New York*, 239 U. S. 195, this court considered the constitutionality of a State statute which provided that preference in public work should be given to citizens of the State of New York, although the party seeking to have the constitutional provision declared unconstitutional was a property-owner and taxpayer of the State of New York.

It was said in *New York Life Ins. Co. v. Hardison*, 199 Mass. 190:

". . . It is a general rule that the court will not consider the constitutionality of a statute upon an objection made by persons whose rights are not affected by it, and usually the parties to the suit are the only ones who are permitted to raise such a question. But where, as in this case, the jurisdiction of the court depends entirely upon the validity of the act, and the attention of the court is brought to that fact by persons interested in the effect to be given to the statute, although not interested in the case before the court, we deem it our duty to consider whether we have jurisdiction, before taking affirmative action. Action of a court that has no jurisdiction is void." Citing Belcher v. Sheehan, 171 Mass. 513.

II.

IF THE STATUTE GIVES A RIGHT TO A RESIDENT OF THE STATE OF CALIFORNIA WHICH IS NOT GIVEN TO A NONRESIDENT OF THAT STATE, THEN IT IS CLEARLY VIOLATIVE OF SECTION 2 OF ARTICLE IV OF THE FEDERAL CONSTITUTION AND ALSO OF SECTION 1 OF THE 14th AMENDMENT.

The distinction drawn between a resident and a nonresident is, as the court below said,

"capable of construction only as a distinction between citizens and noncitizens. The discrimination in the instant case is based directly upon citizenship, and, therefore, independently of the reasonableness of the classification, the statute is violative of the constitution."

No good ground has been urged for this attempted classification, and the careful reasoning

of the court below on the point is not only persuasive but it is as far as this court is concerned conclusive on this particular point.

The Industrial Accident Commission is by the Act given large functions of a *judicial* nature. The State of California could not limit the jurisdiction of this quasi-court to a citizen of that State, any more than it could provide that no one not a citizen of California could sue in its regular State courts. In *Ward v. Maryland*, 12 Wall. 418, this court, while expressly stating that no attempt would be made to define the words "privileges and immunities", did, nevertheless, lay down certain broad characteristics of those expressions as used in the Federal Constitution. It was there said:

> "* * * it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; *to maintain actions in the courts of the State;* and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens." (Italics ours.)

In *Cole v. Cunningham*, 133 U. S. 107, this court said that "the right to institute actions" was one of the privileges and immunities which a State may not confine to its own citizens; and in *Blake v. McClung*, 172 U. S. 239:

> "For instance, a State cannot forbid citizens of other States from suing in its courts, that right being enjoyed by its own people."

Nor is there in *Chambers v. Baltimore & Ohio R. R.*, 207 U. S. 142, anything opposed to the above. It was there held that a statute of Ohio did not violate the Federal Constitution in providing that no action could be maintained in the courts of that State for a wrongful death occurring in another State, except where the deceased was a citizen of Ohio, since the restriction operated equally upon representatives of the deceased, whether they were citizens of Ohio or of other States. The right to sue and defend in the courts of a State by a noncitizen of that State was expressly recognized.

Section 58 of the Act in question affords relief only in cases where the injured employee is a resident of the State at the time of the injury. This, in effect, is the same thing as if the Superior Court of the State of California was given jurisdiction to decide the rights and obligations of a citizen of the State only. It shuts the door of the commission on anyone who is not a resident of the State at the time of the injury. The privilege thus denied is one which a State may not confine to its own citizens.

It was said by the court below:

> "The right of the legislature to enact reasonable regulations governing the creation of contractual liability is unquestioned. When, however, the legislature attempts to provide

that a substantial privilege shall be incident to certain contracts of employment when entered into in this state by citizens of this state and that that privilege shall not be incident to identical contracts of employment when entered into in this state by citizens of other states of our union, the enactment is clearly violative of section 2 of Article IV of the federal constitution. Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other" (fol. 35).

The reasoning of the court and the authorities cited on this point require no further elaboration (fols. 35-38, 56-61, 71-72).

The highest court of the State held in this case that there exists no reasonable ground for a distinction to be drawn by the Legislative Act of California between a citizen or resident of California and a noncitizen or nonresident of that State. This conclusion is binding upon this court, since the particular question does not depend upon the Constitution, laws or treaties of the United States, or upon any principle of the commercial or mercantile law or of general jurisprudence. It was said by this court in *Hartford Ins. Co. v. Chicago etc. Railway,* 175 U. S. 91:

> "Questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed, within one of the States of the Union—when not controlled by the Con-

stitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application—are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest court."

III.

SECTION 58 OF THE CALIFORNIA COMPENSATION ACT DOES NOT COVER THE CLAIM OF A NONRESIDENT OF THE STATE, BECAUSE (a) THE LANGUAGE OF THE ACT PLAINLY LIMITS IT TO INJURIES SUFFERED BY A RESIDENT OF THE STATE, AND (b) THE ENTIRE ACT HAS UNMISTAKABLE EVIDENCE THAT IT WAS NEVER INTENDED BY THE LEGISLATURE THAT THE OPERATION OF THE LAW SHOULD BE EXTENDED TO NONRESIDENTS.

The language of Section 58 of the Act in question is, for convenience, here repeated:

> "The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state *in those cases where the injured employee is a resident of this state at the time of the injury* and the contract of hire was made in this state, and any *such* employee or his dependents shall be entitled to the compensation or death benefits provided by this act." (Italics here and elsewhere in this brief are ours.)

The conclusion of the court below necessarily results in the declaration that the seemingly all essential language italicized above may be quite eliminated from the section with the same result.

Although by the operation of the section of the Federal Constitution relied upon, statutes may in a limited class of cases be held not violative of a constitutional right, nevertheless it is plain that in extending to citizens of the several States the privileges and immunities granted to the citizens of a particular State the court can do no more than interpret the legislative intent. If the legislature has in unequivocal language expressed an intention to the contrary, then the statute cannot be saved by the court. The only question, therefore, is whether or not it is apparent from the language of the section that the legislature of California intended to limit the jurisdiction of the commission to the injuries of an employee who was a "*resident* of this State at the time of the injury". This is recognized in one of the concurring opinions of the court below, where it was said (fol. 75):

> "* * * * It must be observed that the statute does not purport to withhold this privilege from citizens of other States; it is merely silent, with regard to them. If it had contained a clause withholding it from others than residents, such clause would be void. But, as it does not, the result is that the federal Constitution prevents the statute from having the effect of withholding the privilege to citizens of other States."

The language of the section used is as clear and unequivocal as if it had contained a parenthetical clause stating that the commission did *not* have

jurisdiction over a controversy where the injured employee was not a resident of the State. There must have been some substantial reason which caused the legislature to use the language above italicized, and this reason is, obviously, that it was intended that residence in the State at the time of the injury was a condition precedent to the jurisdiction of the commission.

If a statute gives a right or imposes an obligation upon a *colored* person it does not make to the clarity of the statute to add the words "This does not apply to a *white* person". If a law permits fishing in a public stream *above* a certain designated point, the irresistible inference is that the right is not granted *below* that point. *Enumeratio unius exclusio alterius.* When this right was given to an injured employee who "is a resident of this State at the time of the injury", it was *intentionally* withheld from an injured employee who was *not* a resident of the State at the time of the injury. It is not necessary when a right is granted to a particular person that there must in every case follow a denial of the right to others not so circumstanced.

These considerations apply with peculiar force to a statute such as this, which has imposed new obligations upon both employer and employee, and which is a departure from the rules of the common law governing this relationship, because it confers a right without a corresponding wrong. This novel

characteristic is recognized in all the cases where this or similar laws have been consdered.

Arizona Employers' Liability Cases, 250 U. S. 400;

Western Indemnity Co. v. Pillsbury, 170 Cal. 686;

Alabama G. S. R. Co. v. Carroll, 97 Ala. 126.

In the case last cited it is said:

> "The duties and liabilities incident to the relation between the plaintiff and the defendant which are involved in this case, are not imposed by and do not rest in or spring from the contract between the parties. The only office of the contract * * * is the establishment of a relation between them, that of master and servant; and it is upon that relation, that incident or consequence of the contract, and not upon the rights of the parties under the contract, that our statute operates. The law is not concerned with the contractual stipulations, except in so far as to determine from them that the relation upon which it is to operate exists. Finding this relation the statute imposes certain duties and liabilities on the parties to it wholly regardless of the stipulations of the contract as to the rights of the parties under it, and, it may be, in the teeth of such stipulations."

The rights, therefore, granted the injured employee herein were *created* by the statute and must be expressly limited by the terms of that statute. As already noted, the Supreme Court of California had decided (174 Cal. 1), that until this Section 58 was adopted an employee hired in California, but injured without that State, had no claim

to compensation at all through the Industrial Accident Commission. This claim was therefore peculiarily recognized as a *new* right which was created for the first time when this section was adopted.

The language of the section is so clear that it is not possible to extend its terms to nonresidents of the State without doing violence to well-recognized rules of statutory construction. To so extend it is to compel the legislature to create a right in favor of a class of persons which it had expressly intended to exclude.

It cannot be presumed that the legislature would have enacted the section at all if the rights thereby granted were extended to nonresidents. In *Spraigue v. Thompson,* 118 U. S. 90 (cited in Estate of Johnson), the same question was under consideration, and it was there said:

> "The section of the Georgia Code, above quoted, does contain such discriminations as are prohibited by Sec. 4237 Rev. Stat. It excepts from its operation 'coasters in this State', and 'between the ports of this State and those of South Carolina', and 'between the ports of this State and those of Florida'.
>
> It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute which is unconstitutional, may be rejected, and the remainder preserved and enforced. *But the insuperable difficulty with the application*

of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of Sec. 1512 of the Code of Georgia cannot be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by Sec. 4237 of the Revised Statutes." (Italics ours.)

In his concurring opinion in *Chambers v. Baltimore & Ohio R. R.*, 207 U. S. 142, supra, Mr. Justice Holmes said:

> "Although I do not dissent from the reasoning of the judgment, I prefer to rest my agreement on the proposition that if the statute cannot operate as it purports to operate it does not operate at all. I do not think that it can be presumed to mean to give to all persons a right to sue in case the Constitution forbids it to make the more limited grant that it attempts. Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 565. Apart from the statute no one can maintain an action like this in Ohio. I may add that I do not understand that there is anything in the judgment that contradicts my opinion as to the law."

The decision of the Supreme Court of California, to the effect that "despite the invalidity of the discrimination, the statute itself is valid and may be made to apply uniformly to citizens of Califor-

nia and the citizens of the other States" amounts to judicial legislation upon a subject as to which the legislature had either failed or refused to legislate. The court has created a liability which the legislature did not and probably would not create, and it has extended the powers of the Industrial Accident Commission to a field which the legislature by express language refrained from entering upon.

If Section 58 as construed by the usual canons of statutory construction contains a discrimination against a nonresident, then the entire section must fall. The court cannot save it by in effect rewriting the statute. This it does when it eliminates entirely the language "where the injured employee is a resident of this State at the time of the injury". Such is not the expression of the legislative will. If any of its essential elements are in conflict with the Constitution, the court cannot strip it of these elements and leave the remaining portion valid.

> "The statute thus emasculated is not the creature of the legislature; and it would be an act of legislation on the part of the courts, to put it in force. The courts have no right thus to usurp the province of the legislature."
>
> *Meshmeier v. State*, 11 Ind. 482, 486.*

*See also:

Cooley's Const. Limitations, 7th Ed. pp. 246-248;
Warren v. Mayor and Aldermen of Charlestown, 2 Gray 85, 89, per Shaw, Chief Justice;
Central Branch U. P. R. Co. v. Atchison etc. Co., 28 Kans. 325, per Brewer, Justice;
Lathrop v. Wills, 19 Cal. 513, 530;
Slauson v. City of Racine, 13 Wis. 444, 450;
Commonwealth v. Hana, 81 N. E. 149.

Where a statute is silent as to a particular class, and by such silence a discrimination has developed, then the whole statute is void.

IV.

ALTHOUGH THE PROVISIONS OF THE FEDERAL CONSTITUTION MAY, IN CERTAIN CASES, EXTEND THE PRIVILEGES AND IMMUNITIES OF THE CITIZENS OF A PARTICULAR STATE TO THE CITIZENS OF THE SEVERAL STATES, NEVERTHELESS SUCH PRINCIPLE HAS NO APPLICATION IN THE INSTANT CASE, BECAUSE THERE IS THEREBY EXTENDED A BURDEN AS WELL AS A PRIVILEGE OR IMMUNITY.

The foregoing analysis of the case will show that the principle enunciated in the case of *Estate of Johnson*, 139 Cal. 532, is the controlling factor in the final decision of the case. We believe this principle to be a new one so far as this court is concerned, although its very recent decision in *Travis v. Yale & Towne Mfg. Co.*, 40 Sup. Ct. Rep. 228, is recognized by the court below (fol. 65) as having some bearing upon this question. The general principle has been adopted in other courts.*

Estate of Johnson is grounded upon a quotation contained in the opinion in the *Slaughterhouse Cases*, 16 Wall. 36, to the effect that:

> "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the States. * * * Nor did it profess to control

*Kunkel v. State, 170 N. W. Rep. 715; 33 L. R. A. (New Series), 599 and cases cited.

> the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

Section 2 of Article IV extends the "privileges and immunities" of the citizens of one State to the citizens of the several States. It does not purport to extend the *obligations* imposed by one State upon its own citizens to the citizens of another State. This is an all-important distinction. Thus, an obligation for the payment of a poll-tax levied upon all adult persons domiciled within a State on a certain day would not, by virtue of this constitutional provision, extend to a nonresident of the State who happened to be within its boundaries on the day in question. The general and splendid intent of the section was to permit no discrimination in the laws of a State between its own citizens and those of another state. It could be invoked only when the citizens of one State had a distinct "privilege or immunity" which was not extended to the citizens of another State.

The right to secure compensation from the Industrial Accident Commission of California has been treated throughout all these opinions as a distinct "privilege or immunity", without recognition of the *obligation* attached thereto. This

passing on of a benefit is the basis of the entire doctrine. It was never intended to pass on a burden. Thus in *Estate of Johnson*, 139 Cal. 532, it was said (p. 538):

> "In all these cases, and in every other case, if a privilege or immunity has been by the state conferred upon its citizens, and not in terms upon the citizens of other states, such privilege and immunity is not for that reason declared void, but the protecting arm of the constitution is thrown around the citizens of every other state who thus are embraced within the privilege granted. The converse of the proposition is this—and it is the form in which the question has most frequently arisen—that when a state has sought to impose a burden upon citizens of other states not imposed upon citizens of its own state, such effort is always held to be void. This is a most vital distinction, which is lost sight of in the Mahoney case."

In the instant case it is said in the opinion of the court (192 Pac. Rep. Adv. Sheets, 1027) (fols. 63-64):

> "For, where a state endeavors to place a *burden* upon noncitizens of the state which is not put upon citizens of the state, obviously the effect of the federal constitutional provision is to abort the endeavor of the state. On the other hand, however, where a state by statute endeavors to confer and does confer upon its citizens *privileges* and *immunities* not accorded by the statute to citizens of other states, the federal Constitution operates, by the very force of its own language, to place citizens of other states in the same category and upon the same footing as citizens of the state, *in so far as*

concerns the right to have and enjoy the privileges and immunities conferred by the state upon its own citizens. In other words, the federal constitutional provision was designed for the protection of noncitizens, and therefore, in any given case calling for its application, the case and the application must be considered from the viewpoint and in the light of the welfare of the noncitizen." (Italics ours.)

And again, it was said by Mr. Justice Olney (fol. 73):

"When a state endeavors to place a *burden* upon noncitizens, but not upon citizens, the necessary effect of the provision is to strike down the burden, to nullify the law which imposes it. But when the state endeavors to confer upon its citizens *privileges* or *benefits* not conferred on others, the effect is just the opposite. The citizens of other states become 'entitled' to those privileges or benefits, not by the operation of the statute, but by operation of a superior legislative enactment, the federal Constitution, which declares in so many words, that they shall be so entitled. The constitutional provision, in other words, is a declaration that, whatever rights or privileges the citizens of a state may enjoy, the same rights or privileges shall likewise be extended to and enjoyed by the citizens of other states, regardless of the desire of the state that they shall or shall not enjoy them. The result is that employes, both citizens of this state and those of other states, are entitled to the benefits of the act."

This conclusion obviously proceeds upon the theory that the right to claim compensation from the Industrial Accident Commission is a *benefit* or a

privilege, and not a *burden.* Further, that the underlying principle of the whole doctrine is one of equality as between citizens and noncitizens of a State.

The Act in question was passed by the legislature pursuant to certain amendments made to the Constitution of the State, namely, Article XX, Section 17½, which provides:

> "The legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees. No provision of this Constitution shall be construed as a limitation upon the authority of the legislature to confer upon any commission now or hereafter created, such power and authority as the legislature may deem requisite to carry out the provisions of this section."

And Article XX, Section 21, which provides:

> "The legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment irrespective of the fault of either party. The legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration, or by an industrial accident board, by the courts, or by either, any or all of these agencies, anything in this Constitution to the contrary notwithstanding."

Section 1 of the Act states its scope and intent as follows:

"This act and each and every part thereof is an expression of the police power and is also intended to make effective and apply to a complete system of workmen's compensation the provisions of section seventeen and one-half of article twenty and section twenty-one of article twenty of the constitution of the State of California. A complete system of workmen's compensation includes adequate provision for the comfort, health, safety and general welfare of any and all employees and those dependent upon them for support to the extent of relieving from the consequences of any injury incurred by employees in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment, full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury, full provision for adequate insurance coverage against the liability to pay or furnish compensation, full provision for regulating such insurance coverage in all its aspects including the establishment and management of a state compensation insurance fund, *full provision for otherwise securing the payment of compensation, and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any matter* arising under this act to the end that the administration of this act shall accomplish substantial justice in all cases expeditiously, inexpensively and without incumbrance of any character; all of which matters contained in this section are expressly declared to be the social public policy of this state, binding upon all departments of the state government."

The Act binds the *employee* as well as the *employer*. Section 6 provides:

"Sec. 6. (a) Liability for the compensation provided by this act, *in lieu of any other liability whatsoever to any person,* shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death, in those cases where the following conditions of compensation concur:

(1) Where, at the time of the injury, both the employer and employee are subject to the compensation provisions of this act.

(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

(3) Where the injury is proximately caused by the employment, either with or without negligence, and is not caused by the intoxication of the injured employee, or is not intentionally self-inflicted.

Misconduct of Employee or Employer.

(4) Where the injury is caused by the serious and wilful misconduct of the injured employee, the compensation otherwise recoverable by him shall be reduced one-half; provided, however, that such misconduct of the employee shall not be a defense to the claim of the dependents of said employee, if the injury results in death, or to the claim of the employee, if the injury results in a permanent partial disability equaling or in excess of seventy per cent of total; and provided, further, that such misconduct of said employee shall not be a defense where his injury is caused by the failure

of the employer to comply with any provision of law, or any safety order of the commission, with reference to the safety of places of employment; and provided, further, that in case of an injury suffered by an employee under sixteen years of age, it shall be conclusively presumed that such injury was not caused by serious and wilful misconduct.

(b) Where such conditions of compensation exist, *the right to recover such compensation, pursuant to the provisions of this act, shall be the exclusive remedy against the employer for the injury or death;* provided, that where the employee is injured by reason of the serious and wilful misconduct of the employer, or his managing representative, or if the employer be a partnership, on the part of one of the partners, or if a corporation, on the part of an executive or managing officer or general superintendent thereof, the amount of compensation otherwise recoverable for injury or death, as hereinafter provided, shall be increased one-half, any of the provisions of this act as to maximum payments or otherwise to the contrary notwithstanding; provided, however, that said increase of award shall in no event exceed two thousand five hundred dollars.

(c) In all other cases where the conditions of compensation do not concur, the liability of the employer shall be the same as if this act had not been passed." (Italics ours.)

If an employee, by signing in California a contract for employment without the State, may enforce his claims through the Industrial Accident Commission for injuries received without the State, then it must also be true that such employee has waived his right to enforce a claim for negligence

through the courts, either Federal or State, or through the Industrial Accident Commission of another State. This mutual obligation underlies the basis of all these Acts as has been frequently announced by the courts.

In one of the earliest cases in which the highest court of the State of California construed the Act in question, it appeared that the employee, prior to instituting his proceedings before the Industrial Accident Commission, commenced an action for damages in the Superior Court of the State. A demurrer to his complaint was sustained. The question involved was whether or not the employee had any right of action in the courts after the passage of the Act. In denying this right the court said (*San Francisco S. Co. v. Pillsbury,* 170 Cal. 321):

> "* * * It will thus be seen that the right of the employee to resort at his option to an action at law for damages is restricted to the class of cases specified in the provision just quoted, viz, cases where the injury was caused by the employer's gross negligence or willful misconduct of a certain specified character. The judgment of the superior court in Broderick's action simply determines that the allegations of his complaint failed to state a case of this character, and therefore that the proper tribunal for the adjudication of his claim is the industrial accident commission."

In *Middleton v. Texas Power & Light Co.,* 249 U. S. 152, this court held that the compensation required by the Texas Employers' Liability Act to

be paid to an employee when he suffers personal injuries in the course of his employment:

> "is the statutory substitute for damages otherwise recoverable because of injuries suffered by an employee, or his death occasioned by such injuries, when due to the negligence of the employer or his servants; it being declared that the employee of a subscribing employer, or his representatives or beneficiaries in case of his death, shall have no cause of action against the employer for damages except where a death is caused by the willful act or omission or gross negligence of the employer."

The noncitizen of the State who has signed his contract within the State has given up his right to maintain an action in the Federal Courts. If the employer resides in the State of California, as in the present case, the nonresident could, independent of the provisions of this Act, have commenced an action against the employer in the District of Alaska, where the Association is obliged to file a designation of agent upon whom process may be served (Laws of Alaska, Chapter 23) or in the State of Washington, where a similar provision exists (3722 Stat. Wash.). This right resulting from diverse citizenship would not belong to a resident of California, so that there necessarily follows at once an obvious inequality between the two several classes of claimants. The law has discriminated against the nonresident because it has compelled him to forego a right which did not belong to the State's own citizen.

The State cannot take away the right of a noncitizen to sue in the Federal Courts.

Union Bank of Tennessee v. Jolly's Adm'rs., 18 How. 503;
Hyde v. Stone, 20 How. 170;
Payne v. Hook, 7 Wall. 425;
Railway Company v. Whitton, 13 Wall. 270;
Harrison, Secretary, etc. v. St. Louis & San Francisco R. R. Co., 232 U. S. 318;
Wisconsin v. Phila. & Reading Coal Co., 241 U. S. 329.

Thus we reach the conclusion that if Section 58, relating to an accident without the State, is binding upon nonresidents as well as residents, then the above quoted Section 6, stating that the *liability* for the compensation provided by the Act shall be in lieu of any other liability whatsoever, has either set aside the fundamental law, and permits under the broad powers of this Act a noncitizen to be deprived of his right to sue in the Federal Courts, or Section 6 is as to such nonresident inapplicable. In the latter case further judicial construction of the Act is necessary. It must then be said that, although the liability for compensation as imposed upon the employer creates a *right* in favor of both citizens and noncitizens, the other provision of the Act which provides that the *liability* for such compensation is in lieu of all other claims does *not* apply equally to both classes. To make the Act harmonious in one respect and affect equally a citizen and a noncitizen, it is necessary

to add the word "nonresident" to Section 58 and at the same time, in order to prevent such construction resulting in the invalidity of the entire Act, Section 6 must be also judicially amended, so that it will read:

> "Liability for the compensation provided by this Act, *so far as it relates to compensation claimed by a resident of this State,* shall be in lieu of any other liability."

The addition of such language would at once inject into the Act the vice of inequality as between a resident and a nonresident.

The only escape from this situation is to hold that the entire Section 58 is invalid, because the right thereby attempted to be conferred carries with it an obligation which imposes upon the nonresident a greater burden than is imposed upon the resident.

The facts here involved afford a significant instance of such inequality. The employees who go to the Alaskan canneries largely reside without the State of California. They come only temporarily to San Francisco in order to sign their contracts, and then sail for the respective canneries. Some of them are residents of the State of Washington, and have no intention of returning to California, and, indeed, may be sent from San Francisco to work in a cannery in the State of Washington. Yet, under the theory of this case, if they are injured while working in the cannery in Washington,

their home State, they must come back to California to enforce whatever rights they may have against their employer. A further complication arises, in that the State of Washington has established an Industrial Accident Commission of its own, the powers of which differ radically from those of the California Commission. The record (folio 16) states that there is no law in Alaska providing for compensation for injuries to employees irrespective of negligence, but even this is a temporary condition, because there has been proposed for the Legislature of Alaska, which meets in May, 1921, an Act providing for the establishment of such a Commission for the Territory. A copy of this proposed Act is filed with these briefs.

Again, many of these men live in Mexico or Arizona, and simply come to San Francisco for the purpose of working in the Alaskan Canneries in the summer time. By this decision, they are foreclosed from commencing an action in the courts of the State where they are domiciled, or in the United States Courts, but must make their claim to the California Commission. The instant case, furthermore, affords a significant example of the extraordinary departure which these laws make from the common law, for it is here found that the employer was not negligent, but, on the contrary, the employee was negligent, and that his injuries resulted from such negligence on his part. Nevertheless, the employer is held liable. Surely the scope of such tribunals

must be limited if there is to be any certainty whatever as to the application of legal principles. If a man who has not been guilty of any wrong whatever is, nevertheless, compelled to pay money, and such award is legal, it should not be extended beyond the strictest terms of the statute; otherwise, chaos will result.

It is submitted therefore that the cases of which *Estate of Johnson* is a type do not control the present case. They were concerned with statutes (generally taxation measures) which conferred a privilege or immunity upon a citizen which stood alone and was free from complication or intertwining with a reciprocal obligation.

V.

A DISCRIMINATION BETWEEN RESIDENTS AND NONRESIDENTS VIOLATES SECTION 2 OF ARTICLE IV OF THE CONSTITUTION WITH THE SAME EFFECT AS IF THE DISCRIMINATION WERE BETWEEN CITIZENS OF THE SEVERAL STATES.

This court has given an express ruling upon this point in *Blake v. McClung*, 172 U. S. 239. In that case the statute attempted to give a preference to creditors who were residents of the State of Tennessee over those who were residents of other states or countries. The contention was urged that because the distinction was not between citizens of Tennessee and citizens of other states, but was between residents and nonresidents, there was no vio-

lation of the protection granted by the constitutional provision. This court held adversely to this contention.

In *Ward v. Maryland*, 79 U. S. 418, this court condemned as violative of Section 2 of Article IV an ordinance of the City of Baltimore requiring all persons other than *permanent residents of the State of Maryland* to obtain a license for selling certain articles of manufacture. Other authorities to the same effect are given in the footnote.*

There is no statement in the record that any of the parties in interest are *not* citizens of California. The only showing made is that they are residents of that State. The presumption which follows from this statement is that they are also citizens. Section 51 of the Political Code of California defines citizens as follows:

> "* * * 1. All persons born in this state and residing within it, except the children of transient aliens and of alien public ministers and consuls;
>
> 2. All persons born out of this state who are citizens of the United States and residing within this state."

While it is true that under certain circumstances citizenship and residence are not the same thing (*La Tourette v. McMaster*, 39 Sup. Ct. Rep. 160),

State v. Nolan, 122 N. W. Rep. 255;
In re Watson, 15 Fed. Rep. 511;
In re Jarvis, 71 Pac. Rep. 576;
Commonwealth v. Myer, 23 S. E. Rep. 915;
Drew v. Cass, 113 N. Y. S. 1042;
Lewis v. State, 161 S. W. Rep. 154;
Brooks v. Mangan, 49 N. W. Rep. 633.

yet the record here does not give room for such distinction, the presumption being that all the parties are citizens of California as well as residents thereof. The decision in *La Tourette v. McMaster* (supra) construed a statute of South Carolina which permitted only those persons to be licensed as insurance agents who were residents of the State and had been such for at least two years. The term "resident" as here used was not contradistinguished from the term "citizen", but the policy of the State expressed in requiring a certain length of residence in order to equip one for a form of business enterprise.

VI.

THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED.

Dated, San Francisco,
February 21, 1921.

Respectfully submitted,

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